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中国古代罪的观念及其文本化

厦 门 大 学

博 士 学 位 论 文

# 中国古代罪的观念及其文本化

The Concept and Codification of Guilty in Ancient China

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## 内 容 摘 要

罪是中国古代刑法史中的重要概念，也是建构起整个刑法制度的核心要素之一。本文以中国古代的罪为主题，但限于主旨主要考察古代法律中的罪。不过，不同的社会观念或者说不同的社会意识都对中国古代法律中罪的形成产生过深远影响。就目前的研究来看，我国古代罪的整体性研究相对较少。故本文试图从整体层面对中国古代的罪进行梳理，由此形成对罪的产生、发展、完善过程的一般性认识。为此，本文的结构并不执着于严格的历史朝代顺序，而是遵循罪之文字与观念的产生→罪之观念的丰富→罪之文本载体的生成这一顺应事物发生机制的时间轴线索，从而试图将罪从出现到具有法律规范力的整个过程予以清晰地展现出来。

本文对罪之观念出现的考察以可考的证据为前提，以文字记载为准据。从罪的早期文献来看，有关罪之字、句、篇在反映罪的早期观念等方面可说各有其作用。第一，表“罪”义字从西周金文中开始出现，经历了从臯到罪的转变。臯的上自下辛结构反映早期以刑识罪的特征，而罪的上网下非结构反映了后来以法识罪的转变。第二，分析有关罪字的文句则可以看出，西周之际已经形成涵摄君、臣、民三者的相对成熟的罪之观念，罪成为对君、臣、民三者的评价标准。第三，从西周改制的历史背景出现可以发现，罪的产生源于西周塑造制度政治正当性的需求，周公改制的以德配天观念要求推动刑法制度的正当性。具备正当性的刑法在当时来看应该是罪刑均衡且具有一定稳定性的体系。而罪之观念的发展反过来又奠定了古代刑法正当性、罪刑均衡以及立法模式转变的基础。

罪之观念的形成是因为罪承担了一定的职能，而这种职能在于法律试图通过罪来保障特定的利益。在此基础上形成的罪之本质，根植于法益侵害性，其法益侵害性以天道秩序为合法性来源、以公、私利益为根本保障目标，其基本构成包括实体法益上的国家法益、家族法益和个人法益，抽象法益上的秩序法益和情感法益等。国家法益、家族法益和个人法益三者

形成国重于家、家重于个人的法益位阶。

罪的观念及其本质奠基后，随着社会发展，更加丰富多元的罪之观念影响了罪在法律上的发展。一方面，罪从早期涵摄君、臣、民三者逐渐转变为以涵摄臣、民为主，随着德、公、忠等观念的形成与发展，君罪逐渐消解；另一方面，伦理观念、政治观念、先验观念从不同层面共同塑造了古代罪更为系统、可操作性的规则体系。举凡家族伦理观念、政治伦理观念、社会伦理观念、行政管理观念、社会管理观念、经济管理观念以及天理与佛教等观念体现都在罪的形成中发挥了重要作用。而这种罪的规则体系需要从观念转变为具有现实规范力的法律，也即罪需要从观念走向文本，需要在立法中体现自己的价值。

在中国古代成文法背景下，罪的立法需求要从法条走向法篇，再从法篇走向法典。在法条的形成中，以唐律十恶中的“逆”罪为例会发现，从汉代的大逆到唐律的谋大逆与恶逆，逆罪的成型经历了极为复杂的历程。而隋律的“逆”罪与唐律“逆”罪未必完全一致，之所以出现这种情况与伦理观念、政治观念和先验观念在塑造成熟法条中不同程度地发挥着作用有关，以点带面大概其他罪之法条的形成也往往受到这些不同观念的影响。法条形成后，需要集条成篇，古代刑法自《法经》开始逐渐形成以主体、行政事项和行为性质三者有机结合的“以类相从”的编纂标准，只有行为性质标准符合“以罪统刑”的论断。原有的对《法经》之后刑法典“以罪统刑”的看法存在问题。在最终端的法典编纂中，君、臣、民三者的关系建构是重要影响要素，由此最终形成了第一层面的以身份为诉求的总则、分则先后标准，以及第二层面的以法益轻重、发生逻辑、身份尊卑为诉求的分则顺序标准。由此，罪完成从观念逐渐完善成熟，并进而走向法律规则的路程。

**关键词：**罪；罪的观念；法律编纂

## **Abstract**

Crime is one of the most important concepts in China's traditional criminal law. It is also the core of the whole criminal system. This article focused on crime in legal documents of ancient China. Generally speaking, different ideas and social consciousness both have great impacts on the formation of crime in ancient China. The author found that the general research of ancient China's crime hasn't been done, consequently this paper aimed to work on the summary of its origin, development and accomplishment. The structure of the paper didn't conform to the order of dynasties exactly but accord to the time line of the origin of word and concept to the amplification of the concept to the codification of crime.

From early records of crime, the word, sentence and chapter play important roles in defining its concept. First, the word used to describe crime was composed of punishment, which transferred to wrong and punishment. Second, from Zhou Dynasty, crime can be used to describe emperor, officials and civilians. Third, from the background of the Xi Zhou Restructuring, the concept of guilt can be rooted in the demand of political legitimacy, because of the idea of acting according to god's will.

The criminal law with legitimacy should be stable, and find balance between crime and punishment. The development of the concept of sin also laid the foundation for the ancient criminal legitimacy, the balance of crime and punishment and the shift of legislation. The nature of guilt bases on the formation of the infringement of legal interest, which origins from god's will, aims to protect public and private interests, and consists of national interest, family interest, and individual interests. It also protects abstract interest like emotional and orderly interest. National interest comes first, family interest comes second, and individual interest comes last.

After the formation of the concept of crime, with the social development, the concept of crime becomes more rich and diverse. On one hand, crime used to describe

emperor, officials and civilians in early days, but with the development of morality and loyalty, it became people-oriented with the dissipation of emperor's sin. On the other hand, ethics, political ideas, priori concepts shape a more systematic, operable system of rules from different levels. Family ethics, political ethics, social ethics, administrative concepts, the concept of social management, economic management, and ideas from Buddhist and God all played an important role in the formation of crime. The systematization of crime requires it to shift from the concept to practice, and realize its value in legislation.

From the background of statute law in ancient China, we can find that the demands of legislation of crime evolve from article to code. In the formation of the article, take Ni as an example, it experienced extremely complex process from Han Dynasty to Tang Dynasty. Ni in Sui and Tang is not the same, because of different ethics, political ideas and priori concepts. After the formation of articles, the need to set a chapter began to occur. Ancient Criminal Law originated from *Law*, which combining subjects, administrative matters and behavioral properties as the standard of categorization and accomplishment of the balance between crime and punishment. In the final codification, the relationship among emperor, officials and civilians eventually form the general principle of the first level, and the severity of legal interest, the logic and the order form the second level standard. Thus, the concept of crime realizes its way of codification.

**Keywords:** Crime; the Concept of Crime; the Codification of Crime



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